No. 14698

In the United States Court of Appeals

For the Ninth Circuit

G. V. FEELEY, AS ADMINISTRATOR OF THE ESTATE OF GEORGE A. FEELEY, DECEASED,

Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION,

Appellee.

Reply Brief of G. V. Feeley, Administrator as Appellant

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Upon Appeal from the United States District Court for the District of Montana

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The Brief of G. V. Feeley as Administrator of the Estate of George A. Feeley, Deceased

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THE CASE IS NOT BASED ON PRIMARY NEGLIGENCE

The respondent is concerned primarily with an attempt to impress the court, that this was an ordinary negligence

action and that the usual defenses against a negligent plaintiff were available. We submit that the inferences to be drawn from the first twenty-two pages, while perhaps not intentionally so, are misleading and erroneous, because the first twenty-two pages are concerned with cases based on facts which the appellant has conceded, they being that the decedent was in fact, negligent.

On page twenty-two of the respondent's brief it is stated that the theory of the last clear chance is not applicable, and in support of this argument they cite the case of Collins vs. Crimp, 91 Mont. 326, 8 Pac. (2d) 796. That case was not the same as the instant case in that it dealt with a helpless peril situation where the facts obviously indicated that there was no last clear chance to avoid the accident. Further, statements by the respondent indicated on page twenty-seven of its brief that in order to recover in a "negligent inattention situation," that it is necessary that the plaintiff be in a position upon the tracks and that he not be approaching the tracks. We do not believe that is the law in Montana and in support of that statement we refer the court to Sorrels vs. Ryan, 91 Mont. 326, 281 Pac. (2d) 1031, a recent Montana case decided on the "discovered inattention" theory of last clear chance. We quote from context:

> "It is fairly inferable from the allegations of plaintiff's complaint that he stepped into the danger zone from westbound traffic the moment that he crossed the center line of the highway. He was struck after walking 15 feet past the center line. While it is not alleged how fast plaintiff was walking it is fair to

> assume that he did not exceed the usual gait of about three miles per hour. The automobile, which was traveling 15 miles per hour, in order to reach the point of impact would have traveled about 75 feet after plaintiff had stepped into its lane of travel. *Under these circumstances it would be for the jury to say whether defendant had the last clear chance to avoid the injury.*" (All emphasis ours.)

On page twenty-eight of the respondent's brief, a case dealing with primary negligence was cited in support of its argument that the theory of last clear chance doesn't apply. We do not believe the case is in point. The Utah case of Van Wagoner vs. Union Pacific Railroad 186 Pac. (2d) 293 was pleaded on the theory of primary negligence. (See page 294.) Further, the facts of the case clearly revealed that there was no last clear chance in the case due to the time element.

The case cited on page thirty-four and quoted on page thirty-five of the respondent's brief indicates that the only way that a defendant in a case such as this, can avoid injury, would be to stop the train. We submit that this is not true, and that *it should be obvious to anyone that an accident of this nature can be avoided by merely ringing a bell or blowing a whistle, and thereby warning the approaching motorist that he is in peril, and giving him an opportunity to either stop his car or turn it away from the path of the imminent collision. Further, we believe that completely stopping the train would not have been necessary; merely slowing the train may have been enough.*

It is our belief that cases cited in respondent's brief,

page twenty-two to thirty-seven are not applicable to the facts in this case and apply only where the facts definitely indicate that there was never a last clear chance to avoid the accident. Further, while some of the cases indicated that a similar factual situation was considered, none seemed to discuss the Montana rule permitting defendant's discovery of plaintiff's negligent inattention to be established by circumstantial evidence.

On page thirty-seven of the respondent's brief, it is urged that the continuing contributory negligence bars recovery. This is, we think, an inaccurate statement of the law, so far as it pertains to the instant case. The theory of last clear chance applies in the following situations:

(1) The discovered helpless peril (i.e. physical helplessness) of the injured person regardless of the place of injury.

(2) The undiscovered helpless peril (i.e. physical helplessness) of the injured person at a place where defendant is under a duty to keep a lookout as at railroad crossings.

(3) The discovered negligent inattention (i.e. mental obliviousness) of the injured person regardless of the place of injury.

We submit that if the statements in the respondent's brief were true, there could be no recovery in a situation such as ours, where it appears that there has been an actual discovery of an inattentive plaintiff in time to avoid injuring him. This would be completely contrary to the theory of recovery set forth in the "Doichinoff" case.

Further, in this respect, it should be noted at page twenty-six, Montana Law Review, Spring 1944, that the "Neary" and "Doichinoff" cases are held not to be affected by the theory of continued negligence because there was actual discovery of the negligent plaintiff in those cases. It seems clear, therefore, in the light of these cases, that discovery of a negligently inattentive plaintiff is a basis for recovery in the State of Montana and that the theory of continuing negligence does not apply to this situation. It is further stated in our Montana cases that this *actual discovery of a negligently inattentive plaintiff can be established by circumstantial evidence.*

The following statement from Doichinoff vs. Chicago M. & St. P. Ry. Co., 51 Mont. 582 154 Pac. at pages 926 and 927 should clarify that point:

> "It is true that there is not in this record any direct evidence that Koleff was actually discovered by the enginemen in time to avoid the accident; *but the fact may be established by circumstantial evidence.* If, in this instance it had been made to appear that Koleff was walking upon the railroad track in broad daylight, 200 feet or more in advance of Middleton's locomotive, that he was apparently unaware of danger, that the view from the locomotive was entirely unobstructed, that the enginemen were at their respective posts of duty on the locomotive, and were keeping a lookout ahead in the direction of Koleff, that the locomotive could have stopped within from 10 to 30 feet, considering the speed at which it was moving, no one would question the right of a jury to say that Koleff's position was discovered in ample time to avoid striking him, even in the face of positive testimony of the enginemen that they did not see

him at all until he was struck. In other words, *a particular combination of circumstances may be more convincing than direct evidence, whose probative force depends upon the veracity of witnesses more or less interested.* While the case presented by the evidence before us is not so complete as in the supposititious case above, we think it is sufficient to justify the verdict." (All emphasis ours.)

While perhaps many of the statements contained here may be somewhat repetitious, it is nevertheless clear that the following is a concise and accurate statement of the law and the facts of this case:

(1) An action was filed, wherein plaintiff alleged that an individual was killed by a train which was managed by servants of the defendant who had discovered that individual's inattentiveness and peril in time to avoid injuring him, but did nothing to warn him or to avoid injuring him. The result was that a man was killed. Whether or not a discovery was made in time to avoid injury can be established by circumstantial evidence. The following are some of the facts that seem to be pertinent in this case in establishing that there was sufficient evidence of discovered inattention to warrant submission of the case to the jury.

FACTS

The evidence reveals that the railroad ran east and west, (tr. 36) and that the dirt road travelled by Mr. Feeley ran north and south (tr. 42, tr. 37) that the train was going east (tr. 154) and that the accident occurred at about sunset, (tr. 53) indicating that the driver of the jeep in order to see the train might very likely have been

hampered by the rays of a setting sun to the west or by the poor visibility of early twilight.

Even though our case was largely established by employees of the defendant, who were, at best, hostle witnesses, the evidence reveals that the conductor, Clarkin (tr. 198), and the fireman, Becker (tr. 207-210) saw the jeep approaching the track but did nothing to avoid injuring the driver of the jeep, in fact, they did nothing at all until the jeep was hit. (tr. 297.)

The evidence was to some extent conflicting; the fireman who was on the side of the engine toward which the jeep was approaching was, according to his testimony, (tr. 214) looking back when the collision occurred, (tr. 297), yet it is indicated that at the time immediately after the accident, the fireman was wringing his hands and was incoherent, (this is not denied), indicating he watched the jeep approach, knew of the deceased's inattentiveness, but had done nothing until it was too late.

It is for the jury to decide whether or not the men in charge of the train coming from the west when the sun was at or near the horizon, were aware of Feeley's inattentiveness which was apparently brought about by the fact that one looking in the direction of the train may have been blinded by the setting sun or hindered in visibility by early twilight.

In view of the fact that there is no evidence revealing that there was not a last clear chance to avoid injury to the decedent, we believe that the evidence indicating Mr. Feeley's inattentiveness was discovered in time to avoid

injuring him was sufficient to go to jury. It is for a jury to determine, whether they thought Mr. Becker was looking back when a car was approaching his side of the train (Tr. 213-220) (a somewhat unlikely story in view of his duty to keep a lookout) (tr. 220) or whether they thought he actually watched the jeep approaching the train, was aware of Feeley inattentiveness, and still failed to act. This would seem to be the more likely conclusion in view of his "hand wringing" and incoherence after the accident. The evidence seems to be without question that although the fireman had a bell cord near him and could have rung the bell to warn the deceased, that he did nothing at all to warn the deceased (Tr. 213).

(2) There was only *one* cause of action alleged and that was based on the facts heretofore stated. This cause of action alleged discovery of a mentally inattentive plaintiff in time to avoid injuring him. *Negligence of the decedent was admitted and alleged, so there was no issue of contributory negligence in the case.*

(3) Even though the issue of contributory negligence was never in the case, instructions on primary negligence were submitted to the jury.

(4) Where the issue is last clear chance, Montana cases unnamiously agree that contributory negligence is no issue (see the "Doichinoff" case and also see Sorrels vs. Ryan, 28 Pac. (2d) 1031).

(5) Yet, even though negligence was admitted, misleading and erroneous instructions denying recovery, if

the plaintiff was negligent, were submitted. There is no way that instructions on primary and contributory negligence can be reconciled with instructions on last clear chance. The result was that the instructions which were submitted on this theory considerably confused and mislead the jury and resulted in prejudicial and reversible error being committeed in this case. As stated before, we do not pretend to come under the theory of recovery set out in the Humanitarian Doctrine. (If the Humanitarian Doctrine were applicable we would have been permitted recovery even though there was no evidence of discovery of the negligently inattentive plaintiff at the crossing.) Notwithstanding these differences in the extension of the *duty* in the two theories, the basic theory remains the same in last clear chance and in the humanitarian doctrine. This basic theory is that the initial negligence of the plaintiff is admitted in the pleadings and the case is tried and goes to the jury on whether or not steps were taken by the defendant to avoid injury of the plaintiff notwithstanding his original negligence. In both cases whether it be the Humanitarian Doctrine or Last Clear Chance Doctrine, unless there are other allegations, we believe it correct to say that any theory of negligence other than last clear chance, is not only surplusage, but is misleading and confusing to the jury.

In conclusion, we urge that the court read and consider the cases cited on page twenty-four of appellant's original brief, not with the thought in mind that we are attempting to extend the *duty* of a defendant to a negligent plain-

tiff, but to see by way of illustration what we consider the proper handling of the situation where instructions were permitted which deny recovery to a negligent plaintiff in a case where that negligence has already been admitted both in the pleadings and proof and recovery is not sought on any theory of negligence other than last clear chance, or as in those cases, the Humanitarian Doctrine.

A typical statement in the support of our argument may be found in the case of Willhauck v. Chicago R. I. & P. Ry. Co., 61 S.W. 2d 336, 332 Mo. 1165, wherein the following statement may be found:

> "This cause was submitted only on the charge of negligence under the Humanitarian rule. Plaintiff's contributory negligence is no defense to such a charge, and where no other ground of negligence is submitted it is not an issue in the case, and we have frequently held that its injection under these circumstances by an instruction such as above is confusing to the jury and prejudicially erroneous."

It should appear obvious to anyone reading the instructions cited as erroneous in our original brief and comparing them with the instructions which were submitted by the plaintiff in this case on the theory of last clear chance, that there is no way that instructions on the theory of primary negligence can be reconciled with instructions on the theory of last clear chance. Submitting the two sets of instructions to a jury can only result in confusion. It is our belief that no cautionary instructions, no matter how well or carefully worded, can overcome this inherently confusing situation. We believe that while the courts of Montana have never had to pass directly on

this point, that they have always recognized that a contributory negligence instruction need not be submitted in a case where the only issue is last clear chance.

In support of our statement we refer this court again to the "Sorrell's" case which at 281 Pac. (2d) 1031 states as follows:

> "Some of them are cases where the injured person ran suddenly ahead of the oncoming vehicle where the driver had no opportunity to avoid the injury; some discuss the question of the sufficiency of the evidence to warrant recovery which is premature so far as this case is concerned; *others discuss the effect of contributory negligence, a question not involved here because the plaintiff readily admits that he was guilty of contributory negligence.*"

For a further statement in support of our contention that Montana law is in accordance with the Missouri statement, we refer the Court to the Dochinoff case, 154 Pac. 926.

> *"Defendants' offered instructions B and C might have been pertinent upon the issue of Koleff's contributory negligence; but in this instance there was no such issue. Plaintiff's last clear chance theory has its origin in the concession that Koleff was guilty of negligence in the first instance.* (Dahmer vs. Northern Pacific Ry. Co.)"

It has been suggested that the objections to defendant's offered instructions were not definite and specific enough. In reply to this we ask the Court, how could an objection be more specific? We stated that the instructions on primary negligence were not applicable to a last clear chance case and would result in confusing the jury. That, we

believe, was a clear cut and accurate statement of error and the reason for this appeal.

CONCLUSION

The judgment should be reversed for the following reasons:

(1) Primary negligence instructions cannot be properly submitted in a case where the only issue is last clear chance.

(2) The only issue was last clear chance. Because the instructions on last clear chance and primary negligence are basically irreconcilable, the jury was confused and misled, and could not possibly have based a verdict on the instructions submitted in this case.

Respectfully submitted,

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